2013 IL App (1st) 113347-U

SIXTH DIVISION
December 13, 2013

No. 1-11-3347

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 97 CR 32176
	)	
JULIUS EVANS,	)	Honorable
	)	Joseph G. Kazmierski, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: Second stage dismissal of defendant's post-conviction petition affirmed over defendant's contention that post-conviction counsel failed to provide reasonable assistance under Supreme Court Rule 651(c).

¶ 2 Defendant, Julius Evans, appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends that post-conviction counsel failed to provide him reasonable assistance as mandated by Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)).

¶ 3 The record shows that defendant was charged with, *inter alia*, first degree murder in connection with the drive-by shooting death of Moatice Williams. At the ensuing jury trial, the State presented evidence that Andrew Jeffers witnessed the shooting, identified defendant and codefendant Mario Young in a photo array and lineup, gave both oral and written statements, and testified before the grand jury regarding the shooting. Jeffers, however, recanted his identifications at trial, denied making the statements attributed to him, and claimed that he could not recall speaking with an assistant State's Attorney or testifying before the grand jury. He also denied seeing the offenders, or picking defendant and Young out of a lineup or photo array. He later admitted viewing a lineup, but asserted that police told him who to pick out, and alleged that police told him to "stick with the story[,]" but he was unable to explain what "story" they were referencing. Jeffers further claimed that police threatened him by telling him "either or[,]" but he was also unable to explain what that meant, or why he perceived it as a threat.

¶ 4 The jury found defendant guilty of first degree murder and he was then sentenced to natural life imprisonment. This court affirmed that judgment on direct appeal. *People v. Evans,* No. 1-00-3191 (2002) (unpublished order under Supreme Court Rule 23).

¶ 5 On June 3, 2003, defendant filed a *pro se* post-conviction petition alleging in relevant part, that he was denied his right to the effective assistance of trial counsel, who withdrew and did not refile motions to quash his arrest and suppress identification testimony, after failing to investigate and present two witnesses whose testimonies could have been favorable to those motions. Defendant identified the two witnesses as his mother, Yvonne Fluker, and co-defendant Young's father, Daniel Cage, but did not attach affidavits from either individual to his petition. He alleged, however, that Cage had initially told police that he saw defendant, Young and another co-defendant immediately following the offense inside the vehicle used in the drive-by shooting. At Young's trial, Cage recanted, stating that he "had no real knowledge of the

offense, that he was a narcotics addict[,]" and that he "formulated his plan and spurious account of the crime solely to secure his own release from custody." Defendant asserted that his trial counsel was ineffective for failing to call Cage as a witness because Young was acquitted based on Cage's trial testimony, and because police used Cage's identification to coerce Jeffers's later identification, leading to his arrest. As to Fluker, defendant asserted that she had attended Young's trial, and had informed defendant and his counsel about Cage's testimony.

¶ 6 Defendant's petition was advanced to the second stage, and he was appointed counsel, who subsequently appeared in court on multiple occasions, communicating to the court the status of her review of the petition and the record. On four separate dates, counsel referred to her investigation of witnesses, and stated that she "had [her] investigator out[,]" but had not yet been able to reach the witnesses. On the next court date, a different public defender filed her appearance on behalf of defendant, and informed the court that prior counsel was no longer with the office.

¶ 7 Over the next several court dates, counsel informed the court of the status of her review, and, on October 22, 2009, counsel stated that she had begun reviewing previous counsel's notes and reading the record. Subsequently, on March 11, 2011, counsel filed a Rule 651(c) certificate in which she stated that she had consulted with defendant to ascertain his contentions of deprivations of his constitutional rights, obtained and examined the report of proceedings of the trial and sentencing, and determined that defendant's "previously-filed *pro se* petition for post-conviction relief adequately sets forth [his] claims of deprivation of his constitutional rights."

¶ 8 On July 28, 2011, the State filed a motion to dismiss, asserting, in relevant part, that defendant's claims regarding Cage and Fluker were mere conclusions, and not supported by the affidavits of either potential witness. The State further averred that defendant would be unable

to overcome the presumption that counsel's decision to withdraw the pretrial motions at issue was a matter of trial strategy.

¶ 9 At the hearing on the motion to dismiss held September 22, 2011, counsel listed defendant's claims, specifically noting defendant's assertion that trial counsel was ineffective for failing to interview Cage and Fluker. Counsel repeated in open court that she had consulted with defendant by mail and reviewed the entire record, and that she was standing on defendant's *pro se* petition, having determined that he had adequately presented his claims.

¶ 10 Before the court entered its ruling on October 20, 2011, defense counsel requested permission to file an affidavit that she had "received" from Fluker "to support [defendant's] allegations in his post-conviction petition." The circuit court denied the request, stating that "[w]e're beyond that point, at least as far as I'm concerned." The court then granted the State's motion to dismiss, observing, in relevant part, that defendant's claims could have been raised on direct appeal, and were therefore waived. In addition, the claims were unsupported, conclusory and speculative, and, defendant did not provide any evidence that counsel was unreasonable or that the witnesses' anticipated testimony would be favorable to his case. The court also determined that defendant had not overcome the great deference afforded to the strategic decisions of counsel.

¶ 11 On appeal, defendant abandons the allegations made in his petition, and contends that his post-conviction counsel failed to provide him a reasonable level of assistance based on counsel's failure to amend his petition to include support for his claims. We initially observe that by focusing solely on this issue, defendant has waived for review the allegations in his petition. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 12 The appointment of counsel at the second stage of post-conviction petition proceedings is a statutory right (725 ILCS 5/122-4 (West 2010); *People v. Turner*, 187 Ill. 2d 406, 411 (1999))

and entitles petitioners to a "reasonable" level of assistance (*People v. Perkins*, 229 Ill. 2d 34, 42 (2007)). Rule 651(c) provides that reasonable assistance requires the performance of three duties: (1) consulting with defendant either by mail or in person to ascertain his constitutional claims; (2) examining the record of the trial court proceedings; and (3) making any amendments to the *pro se* petition necessary to adequately present defendant's claims. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *Perkins*, 229 Ill. 2d at 42. Substantial compliance with the rule is sufficient (*People v. Richardson*, 382 Ill. App. 3d 248, 257 (2008)), and our review of an attorney's compliance is *de novo* (*People v. Jones*, 2011 IL App (1st) 092529, ¶ 19).

¶ 13 Where, as here, post-conviction counsel files a Rule 651(c) certificate, a rebuttable presumption is created that counsel provided reasonable assistance, and it is then defendant's burden to overcome this presumption by demonstrating that counsel failed to substantially comply with the duties required by the rule. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. Although the presumption may be rebutted, we find, for the reasons that follow, that defendant has not done so in this case.

¶ 14 Defendant contends that post-conviction counsel's failure to either properly support his claims with the affidavits of Cage and Fluker, or the trial transcripts of Cage's testimony, shows that she did not comply with Rule 651(c). He maintains that the failure to include such support is "fatal" to a post-conviction petition, and accordingly, counsel's failure to amend his unsupported petition necessarily shows that she failed to provide reasonable assistance. *People v. Delton*, 227 Ill. 2d 247, 254-55 (2008).

¶ 15 The supreme court has determined that under Rule 651(c), post-conviction counsel is obligated to attempt to obtain and submit affidavits from witnesses identified in the post-conviction petition. *Perkins*, 229 Ill. 2d at 44 (citing *People v. Johnson*, 154 Ill. 2d 227, 247 (1993)). However, where a post-conviction petition is not supported by affidavits or other

documents, the trial court may reasonably presume that "post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claims, but was unable to do so." *Johnson*, 154 Ill. 2d at 241. This presumption is apt here, where even defendant concedes that it would have been "difficult to obtain" an affidavit and testimony from Cage admitting that he lied to get out of jail. Thus, the absence of affidavits in this case does not lead to the conclusion that counsel did not attempt to secure them. *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 25.

¶ 16 Notwithstanding, defendant contends that the record supports a finding that counsel failed to provide reasonable assistance. He observes that, at the hearing on the motion to dismiss, counsel did not explicitly state that she had contacted or attempted to secure affidavits from the witnesses named in defendant's petition. In *Jones*, 2011 IL App (1st) 092529 at ¶¶ 24-26, however, we found nothing in Rule 651(c) to suggest that the certification is intended to be a comprehensive recounting of all the efforts made by post-conviction counsel, and we will not presume that counsel failed to provide reasonable assistance simply because she did not explicitly mention each of her efforts.

¶ 17 Defendant next claims that counsel's late attempt to file Fluker's affidavit showed that she was "less than diligent" in seeking it. He contends that counsel's statement that she "received" the affidavit from Fluker shows that Fluker was willing to execute an affidavit but that counsel merely failed to pursue it. We disagree. There is no evidence in the record to indicate that Fluker was available or willing to produce an affidavit at any time prior to when she gave it to counsel. To the contrary, the record shows that defendant's previous counsel repeatedly informed the court of her unsuccessful attempts to track down witnesses, and new counsel informed the court of her ongoing review, including her review of her predecessor's notes, before certifying to the court that she had consulted with defendant, reviewed the record, and

determined that the petition as written adequately represented his constitutional claims. As such, we find that defendant has failed to rebut the presumption of reasonable assistance arising from the filing of the certificate. *Profit*, 2012 IL App (1st) 101307 at ¶¶ 30-31.

¶ 18 Defendant disagrees, asserting that counsel, at the very least, should have supplemented his petition with transcripts of Cage's testimony from Young's trial, which he claims would have been easy to obtain, or counsel should have explained why such documents were not attached. 725 ILCS 5/122-2 (West 2010). The State responds that counsel did not render unreasonable assistance by failing to attach these documents, because their filing "would not have had any impact on [his] conviction" as defendant's claims were nonmeritorious. Defendant replies that we must review his claims regarding counsel's compliance with Rule 651(c) without regard to the merits of his petition, citing *People v. Suarez*, 224 Ill. 2d 37, 42, 51 (2007).

¶ 19 We initially observe that in *Suarez*, post-conviction counsel had not filed a Rule 651(c) certificate and the record did not show he had consulted with the defendant. In that context, the supreme court held that remand was required regardless of whether the claims raised in the petition had merit. *Suarez,* 224 Ill. 2d at 44, 47, 52.

¶ 20 Here, by contrast, counsel filed a Rule 651(c) certificate, giving rise to a rebuttable presumption that she performed the duties required by that rule. *Profit*, 2012 IL App (1st) 101307 at ¶ 23; *Jones,* 2011 IL App (1st) 092529 at ¶ 23. In *Profit*, this court determined that, where counsel has filed a certificate, "the question of whether the *pro se* allegations had merit is crucial to determining whether counsel acted unreasonably by not filing an amended petition." *Profit*, 2012 IL App (1st) 101307 at ¶ 23. In making that assessment, we are guided by the supreme court's pronouncement in *People v. Greer,* 212 Ill. 2d 192, 205 (2004), that "[f]ulfillment of the third obligation under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf. If amendments to a *pro se*

postconviction petition would only further a frivolous or patently nonmeritorious claim, they are not 'necessary' within the meaning of the rule." In this regard, we also note that while section 122-2 of the Act requires defendant to state why supporting documentation is not attached to his petition to avoid summary dismissal, there is no corresponding requirement in counsel's duties under rule 651(c), as alleged by defendant.

¶ 21 That said, defendant alleged in his petition that trial counsel was ineffective for failing to call Cage to testify in support of a motion to quash his arrest and suppress Jeffers's identification. He maintained that Cage's identification was the basis for Jeffers's subsequent identification of him, and thus, argues here that post-conviction counsel provided unreasonable assistance by failing to amend his petition to include his affidavit. We initially note that defendant's claim is based on speculation that Cage was willing to do so—a claim that even he has questioned in this court—and that Cage's testimony would have been consistent with his trial testimony in Young's case. Our supreme court has noted that " '[a] defendant cannot rely on speculation or conjecture to justify his claim of incompetent representation.' " *People v. Deleon,* 227 Ill. 2d 322, 337 (2008), quoting *People v. Pecoraro,* 175 Ill. 2d 294, 324 (1997).

¶ 22 In addition, we observe that defendant's claim is contradicted by his own motion to suppress identification, in which he contended that Jeffers was first pressured to identify defendant in a photo spread on July 31, 1997, and that Cage identified defendant on September 27, 1997. In these circumstances, it is unlikely that Cage's identification influenced Jeffers's identification, since it occurred later in time. This conclusion finds further support in the trial testimony of Detective Munoz, who testified that he and another officer spoke to Jeffers even earlier, on July 28, 1997, and that Jeffers identified defendant on that date.

¶ 23 Moreover, even assuming that Cage would testify as anticipated, such testimony would be irrelevant to Jeffers's identification of him as one of the shooters. On a motion to suppress

identification, defendant bears the burden of establishing that, under the totality of the circumstances, the pretrial identification was so unnecessarily suggestive and conducive to irreparable mistaken identification that defendant was denied due process. *People v. Karim*, 367 Ill. App. 3d 67, 87 (2006). In these circumstances, whether Cage was truthful or not in identifying defendant as a person he saw inside the vehicle used in the crime, is unrelated to whether Jeffers's identification of him as the shooter was valid, or whether the police used suggestive practices in securing that identification. The record thus discloses no reasonable probability that, had counsel presented Cage's trial testimony in the Young case, defendant's arrest would have been quashed or Jeffers's identification would have been suppressed.

¶ 24 The record also shows that, at the time trial counsel withdrew the motions to quash arrest and suppress evidence, counsel was aware of Cage and the transcripts from Young's trial, which supports the conclusion that the decision to withdraw the motion and not refile was one of trial strategy, which is generally immune from claims of ineffective assistance of counsel. *People v. Johnson,* 385 Ill. App. 3d 585, 601-02 (2008). Defendant's ineffective assistance claim regarding Cage would thus fail for lack of prejudice or deficient performance. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

¶ 25 With respect to trial counsel's failure to investigate and present the testimony of Fluker, the limited references to her in the petition indicate only that she could testify that she attended Young's trial, observed Cage's testimony, and spoke to defendant and his trial counsel about it. Under these circumstances, her testimony regarding Cage would be inadmissible hearsay (*People v. Banks*, 237 Ill. 2d 154, 180 (2010)), and, as such, would also not support a claim of ineffective assistance of counsel. Accordingly, we conclude that post-conviction counsel did not provide unreasonable assistance by failing to supplement defendant's petition with the suggested

documentation, when doing so would only further a nonmeritorious claim. *Greer,* 212 Ill. 2d at 205.

¶ 26 In reaching that conclusion, we note that the State and defendant in his reply brief, refer in footnotes to *Kirk*, 2012 IL App (1st) 101606, ¶ 31, and *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 33, where it was held that post-conviction counsel was required to allege a claim of incompetence of appellate counsel in order to avoid waiver. In both *Kirk* and *Schlosser*, however, post-conviction counsel raised such a claim for the first and only time at the hearing on the State's motion to dismiss the petition, and "effectively admitted" to the court that the defendant's main claim included ineffective assistance of appellate counsel, despite failing to include that claim in the petition. *Schlosser,* 2012 IL App (1st) 092523, ¶ 28; *Kirk*, 2012 IL App (1st) 101606, ¶ 31. No such representations were made in this case, and we thus find *Kirk* and *Schlosser* factually distinguishable.

¶ 27 Defendant finally contends, citing *Greer*, 212 Ill. 2d 192, that if counsel determined that his claims were nonmeritorious, she was required to withdraw as counsel rather than file a Rule 651(c) certificate. In *Greer*, post-conviction counsel was appointed solely because the court failed to dismiss the petition within the required time for summary dismissals. *Greer*, 212 Ill. 2d at 194-95. Instead of filing a Rule 651(c) certificate, counsel moved to withdraw on the basis that the petition lacked merit. *Greer*, 212 Ill. 2d at 195. The issue before the supreme court was whether post-conviction counsel, once appointed, could withdraw instead of complying with the duties set out in Rule 651(c). *Greer*, 212 Ill. 2d at 195-96. Although *Greer* permits withdrawal where the defendant's petition cannot be amended to state a meritorious claim, it does not set out a *per se* rule that counsel must withdraw instead of complying with Rule 651(c) and standing on the *pro se* petition. Rather, when counsel finds defendant's claims to be without merit, "[t]he case law provides options. One is to stand on the allegations in the *pro se* petition and inform

the court of the reason the petition was not amended. Another is to withdraw as counsel." *People v. Pace*, 386 Ill. App. 3d 1056, 1062 (2008) (citations omitted). As applied to the case at bar, we find that counsel was not required to withdraw, and that her decision to stand on defendant's *pro se* petition was not unreasonable.

¶ 28 For these reasons, we affirm the second stage dismissal of defendant's post-conviction petition by the circuit court of Cook County.

¶ 29 Affirmed.